(2)

FILED
MAR 4 - 2005

No. 04-1005

IN THE

Supreme Court of the United States

NANCY DICKENSON, CONSERVATOR FOR SANDRA ROBINSON,

Petitioner,

v.

CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

M. LACY WEST
Counsel of Record
STEVEN C. ROSE
JULIA C. WEST
WEST & ROSE
537 E. Center Street
P.O. Box 1404
Kingsport, TN 37662
(423) 246-8176

Counsel for Respondent

192989

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

This defendant does not agree with the statement of issues presented for review by the petitioner with regard to the admission of Dr. Johnson's testimony. Instead, this defendant says that the Statement of Issues presented for review with regard to the opinion of Dr. W. Dudley Johnson is as follows:

Did the Sixth Circuit err in finding that the Magistrate did not abuse his discretion under the principles of the Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 679 (1993), *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) when it declared the testimony of plaintiff's expert Dr. W. Dudley Johnson to be unreliable?

CORPORATE DISCLOSURE STATEMENT

Respondent, Cardiac and Thoracic Surgery of Eastern Tennessee, P.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STANDARD OF REVIEW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	11
CONCLUSION	19

TABLE OF CITED AUTHORITIES

Page

CASES:

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 679 (1993) ..... i, 1, 12

General Electric Company v. Joiner,
522 U.S. 136 (1997) ..... i, 15

Kumho Tire Company, Ltd. v. Carmichael,
526 U.S. 137, 119 S. Ct. 1167 (1999) ..... i, 12

Legg v. Chopra,
265 F.3d 286 (6th Cir. 2002) 11

Robinson v. LeCorps,
83 S.W.3d 718 (Tenn. 2002) 13

STATUTES:

Tenn. Code Ann. § 29-26-115 .....1, 11, 12, 13

RULES:

Fed. R. Evid. 702 ..... i, 1, 12

STANDARD OF REVIEW

The question of admissibility of expert testimony is not an issue of fact such as presented on Motion for Summary Judgment but is reviewable under the abuse of discretion standard.

STATEMENT OF THE CASE

This is a medical malpractice case and as such the contested issue of material fact is the standard of care which must be determined in the context of T.C.A. § 29-26-115 and Rule 702 of the Federal Rules of Evidence. Evidence must also pass muster of the trial court in determining its reliability under the *Daubert* rule. The issues in this case require review of the evidence with regard to the reliability of testimony by the plaintiff's primary witness, Dr. W. Dudley Johnson, and the reasons why the trial court found his proffered testimony to be unreliable and therefore refused to allow it.

The Court of Appeals affirmed this action on the part of the District Court.

Sandra Robinson came under the care of Dr. Richard Michalik, a cardiac surgeon, at Holston Valley Medical Center in Kingsport, Tennessee on November 10, 1998. Dr. Michalik is an employee of Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. Dr. Michalik performed a myocardial revascularization procedure under general anesthesia on plaintiff. This procedure is also known as a coronary artery bypass graft. During that procedure the anesthesiologist noted wheezing with respect to the patient's breath sounds, and based on this as well as Ms. Robinson's previous medical

history and physical condition immediately post-operatively, it was Dr. Michalik's opinion that a pulmonary consult was appropriate. He ordered consultation with Dr. Robert Rosser, a pulmonologist, who ordered a trial of CPAP followed by blood gases tests. Dr. Rosser, subsequently without the participation of Dr. Michalik, ordered the extubation of Ms. Robinson.

Dr. Michalik says that when he obtained a pulmonary consult from Dr. Rosser the standard of care in Kingsport with regard to a post-operative patients such as Ms. Robinson in November, 1998, provided that Dr. Rosser would take over the pulmonary responsibility for Ms. Robinson. Dr. Michalik says that he had the right to rely on the expertise of Dr. Rosser with respect to her pulmonary care and he did so, and Dr. Rosser's subsequent intubation of Ms. Robinson was appropriate and met the standard of care in Kingsport, Tennessee with regard to respiratory management. Dr. Michalik also explained that one of the compelling reasons that pulmonologists are to assume management of any ventilator or pulmonary therapies after consultation is that such management provides the patient with continual access to board certified pulmonologists who can be readily accessed or on the scene and who are knowledgeable of such patients instead of relying on the cardiac surgeons who may be relatively inaccessible because of extended obligations in the operating room. Another reason, according to Dr. Michalik, is that a consulting pulmonologist is more highly trained in pulmonary care and management than a cardiac surgeon.

Therefore the standard of care, according to Dr. Michalik, in Kingsport, Tennessee, is predicated on the belief that other patients' variables notwithstanding best management of the

pulmonary status in difficult or complex patients such as Ms. Robinson is provided by certified pulmonologists such as Dr. Rosser.

Dr. Rosser also testified in his deposition that after consultation he was responsible for the primary respiratory management of the patient. Dr. Rosser said that he had no recollection of any circumstance in which he had not been the decision maker with respect to extubation, and that he would not, as a routine, call Dr. Michalik to discuss extubation. He said that he had provided pulmonary consultation on cardiac patients operated on by Dr. Michalik on many occasions prior to November, 1998, when he treated Mrs. Robinson. Dr. Rosser said "that there may be a hundred or more." (R. 223, Brief in Support of Motion for Summary Judgment, deposition of Dr. Rosser, Collective Ex. 11, JA pp. 1309 - 1313).

The only witness offered by the plaintiff to contradict the standard of care in Kingsport, Tennessee, as defined by Dr. Michalik and Dr. Rosser was Dr. W. Dudley Johnson, a cardiac surgeon in Milwaukee, Wisconsin. Dr. Johnson filed a report regarding his opinions concerning the plaintiff Sandra Robinson. In his report Dr. Johnson noted that there is a "TO" (telephone order) from *Dr. Rosser to extubate the patient on the morning of November 11th.* Dr. Johnson is of the opinion that the patient was under-ventilated at this time and says that the patient "should not have been extubated in this condition. It is a deviation in the standard of care for the patient to be extubated at this time. *Both Dr. Michalik and Dr. Rosser* are negligent." (R. 223, Brief, Report of Dr. W. Dudley Johnson, Ex. 3; JA pp. 1330 - 1342).

In an Affidavit filed in response to this defendant's Motion in Limine and Motion for Summary Judgment Dr. Johnson attempted to demonstrate the source of his alleged claim of familiarity with the standard of care in Kingsport, Tennessee. As one of his sources of claimed knowledge Dr. Johnson referred to "*statements of Dr. Rosser and Dr. Michalik contained in their depositions wherein they described the standard of care; statements of Dr. Rosser and Dr. Michalik contained in their depositions wherein they described their educational backgrounds and training.*" [emphasis supplied]. He also stated that in Kingsport, Tennessee "[W]hen a consultation is requested, like what occurred in this case, then both the cardiac surgeon and pulmonologist share in the respiratory management of the patient." Dr. Johnson said the decision to extubate a patient following by-pass surgery is an important part of the respiratory management and in this case, and he claimed Dr. Richard Michalik and Dr. Rosser are "both responsible to make the correct decision." (R. 223, Brief, Report of Dr. W. Dudley Johnson, Exhibit 3; JA pp. 1330 -1342).

In addition, Dr. Johnson claimed that "primarily the cardiac surgeon was responsible to see that the patient receives appropriate pulmonary management post-operatively. However, he/she may request consultation from the pulmonologist." Further, with regard to the standard of care he said that "there is no difference in the standard of care for the treatment of Sandra Robinson by a board certified medical doctor or by someone who is practicing in the fields of cardiac surgery and pulmonology, or intensive care nursing and medicine." (R. 223, Brief, Report of Dr. W. Dudley Johnson, Exhibit 3; JA pp. 1330 - 1342).

Dr. Johnson went on to state that the standard of care for a board certified physician in Kingsport, Tennessee is the same as a board certified physician in any state.

Dr. Johnson in his Affidavit claims Dr. Michalik stated in his deposition that the decision to extubate a patient is a collaborative effort. This is *not* a correct rendering of Dr. Michalik's testimony. Dr. Michalik said that his responsibility was to see that the patient receive the best possible pulmonary care, and that this is the reason that he would refer a patient to a pulmonologist.

Dr. Johnson makes the unequivocal statement in his Affidavit that "I have read the questions and answers of Dr. Rosser and Dr. Michalik during their deposition as they pertain to the standard of care." (R. 206, Response of Plaintiff, Affidavit of W. Dudley Johnson; JA pp. 903 - 909). He also makes the flat statement that "*the standard of care in Milwaukee, Wisconsin would be identical* (emphasis supplied) to the explanation given by Dr. Rosser and Dr. Michalik." (R. 206, Response of Plaintiff, Affidavit of W. Dudley Johnson; JA pp. 903 - 909). In short, the plaintiff's expert witness is adopting the testimony of Dr. Michalik and Dr. Rosser to support his claim that the standard of care is the same in Milwaukee as that standard set forth by Dr. Rosser and Dr. Michalik in their depositions and affidavits. *Such testimony by Dr. Michalik and Dr. Rosser however establishes a standard of care entirely different from that proclaimed by Dr. Johnson.*

Dr. Michalik testified in his deposition with regard to the standard of care as follows:

Q. Well, explain, in as much detail as you wish, what the standard of care would require for a cardiac surgeon post-operatively on a patient that has the pulmonary history you've given for Ms. Robinson.

A. *The standard of care would be once that you recognize that you do indeed have a pulmonary patient that has some difficulty, some risk factors that are coming into play, to make sure that she gets the best possible pulmonary care.*

Q. *Now, I that – when the patient is to get the best possible pulmonary care, is it at the hand of the cardiac surgeon, at the hands of the pulmonologist or both?* (emphasis supplied).

A. The pulmonary care, specifically?

Q. Yes, Sir. I'm talking about the pulmonary care, specifically, yes.

A. *It would be the pulmonologist. That's why I ask them to do that.* (emphasis supplied).

Q. All right.

A. *They do not operate in a vacuum, but the pulmonary care is their province.* (emphasis supplied)

(R. 223, Brief in Support of Motion for Summary Judgment, deposition of Dr. Michalik, Collective Ex. 10, pp. 30 and 31 JA pp. 1307 - 1308).

Dr. Rosser also testified in his deposition as follows:

Q. Well, I guess more specifically I'm asking how did the two of you provide respiratory management to the patients post-operatively? For example, was it all left up to you? Was it a joint decision that you all would talk about jointly? Did he listen to you and say, "Oh, I'm going to do my own thing anyway"? I mean, give me what habit, if any, there was between you, or routine between you and Dr. Michalik with respect to how the two of you managed patients respiratory wise, post-operatively?

A. I would make the changes. If I had concerns, I might talk with him about my concerns.

Q. Well, between the two of you, who provided the respiratory management of the patients?

A. *I would be providing the primary management.*

Q. Okay. And when you say "primary", would he be secondary or there would be other secondary?

A. As I alluded to earlier, in the circumstances of an emergent situation, some problem, and if he were present and I was not, and I have no recollection of a specific incidence in which that was done, but that would be what I

would anticipate. I would anticipate that he would respond appropriately until I or my representative did respond.

Q. For example, the decision to extubate a patient, when you have been consulted by Dr. Michalik in the past, have you always been the *decision maker with respect to extubation*? (emphasis supplied).

A. *Always is a difficult word. I have no recollection of any circumstance in which I was not.* (emphasis supplied).

Q. Would you – was it your practice to discuss with Dr. Michalik that decision process as a courtesy or for input from Dr. Michalik?

A. I wouldn't, as a routine, call him to discuss extubation.

Q. What type of circumstance would cause you to talk with him about extubation or circumstances?

A. You know, it would be numerous potential categories, if she might need another procedure. I said she, the individual might need another procedure. If there was some element of her care that I thought was outside my (inaudible – loud cough), if you will, I might see if my extubation of the patient would impact what else they were doing, that sort of thing, I mean, there's many potential reasons why I might.

Q. With respect to Sandra Robinson, did you become involved with her care on November the 10th . . . .

A. Yes.

Q. . . . . 1998? And was that because Dr. Michalik had requested a consultation from you?

A. Yes.

Q. Do you recall how you were notified of his request for consultation?

A. Yes. He called me.

(R. 223, Brief in Support of Motion for Summary Judgment, deposition of Dr. Rosser, Collective Ex. 11, pp. 27, 28, 29, 30; JA pp. 1310 - 1313).

Further, Dr. Johnson has not indicated how the Kingsport medical community was similar to, and thus had the same standard of professional care as the community with which he was familiar. In his report he simply make the conclusory statement that the facts surrounding the health care in Kingsport, Tennessee was "substantially similar to the medical community in which he practices and has practiced for a number of years."

The defendant Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. also submitted to the court the following Affidavits which established that the standard of care is other than that claimed by Dr. Johnson.

1. Dr. David E. Sewell, founder of Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. stated that under the orders issued by Dr. Michalik, which were for pulmonary medical consult, that pulmonary medicine assumed management of the plaintiff's ventilation and extubation and that Dr. Michalik had transferred the pulmonary care to Dr. Rosser according to the standard of care practice in Kingsport.

2. Dr. Ken W. Smith, neurosurgeon practicing in Kingsport, Tennessee, is familiar with the standard of care of physicians who treat patients post-operatively for conditions such as cardiac surgery as performed on Sandra Robinson. Dr. Smith is of the opinion that the standard of care in Kingsport is that when a pulmonologist is called to consult on a heart patient or other surgery patient that the pulmonologist is responsible for the respiratory management of the patient as long as he or she stays on the case of that patient, and the cardiac surgeon has a right under the standard of care in Kingsport to rely on the pulmonologist for the respiratory management of the patient.

3. Dr. Richard Feit, who is a member of the Cardiac and Thoracic Surgery of Eastern Tennessee, P.C. has practiced cardiac surgery in Kingsport, Tennessee since 1982. He is of the opinion that the pulmonologist, under the standard of care in Kingsport, Tennessee, is in charge of ventilatory management of the patient and the cardiac surgeon has a right to rely on decisions of the pulmonologist with relation to the extubation and intubation of the patient.

4. Dr. Robert McKay, a board certified anesthesiologist in neighboring Bristol, Tennessee states his opinion as follows:

> In my opinion Dr. Michalik did not deviate from the standard of care for a physician providing postoperative respiratory care to a patient in the intensive care unit following cardiac surgery in Kingsport, Tennessee in November, 1998. He very appropriately obtained a postoperative pulmonary medicine consult on Mrs. Robinson. The combination of morbid obesity, tobacco abuse, high levels of anxiety, and the observation of intra-operative wheezing and rhonchi made the consultation prudent. Once this consultation was made, Dr. Michalik was entitled to rely on Dr. Rosser and the pulmonary medical service for the respiratory care of his postoperative patient.

(R. 223, Brief, Affidavit of Dr. Robert McKay, Ex. 8; JA pp. 1275 - 1303).

REASONS FOR DENYING THE PETITION

The petitioner in this case in asserting her claim for medical malpractice must prove the standard of care applicable to the defendant's medical specialties in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred, and that the defendant breached such standard of care and the plaintiff sustained injuries as an approximate result of the breach. See T.C.A. § 29-26-115.

In *Legg v. Chopra*, 265 F.3d 286 (6th Cir. 2002) the court held that even if a witness is deemed competent to testify to the substantive issue in the case such as the standard of care,

this in and of itself does not completely fulfill the requirements for admissibility. The expert testimony should then be screened under Rule 702 to determine if it is otherwise admissible. The court in *Legg* went on to hold that there was no conflict between T.C.A. § 29-26-115 and FED. R. EVID. 702, since the first is directed toward establishing the substantive issue in the case and the second is a gatekeeping measure designed to insure "fairness in administration" of the case.

Under *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, the court established that the "*Daubert* 'gatekeeping' obligation" applies not only to scientific testimony but to all expert testimony and the objective of *Daubert's* "gatekeeping" requirement is to make certain that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

The trial court in this case stated in its Memorandum Opinion that "under *Daubert* the trial court is to serve as the gatekeeper and determine if the proffered testimony of an expert is reliable. If it is not, the testimony should not be admitted."

In determining whether or not Dr. Johnson's testimony was reliable the court had the following facts before it:

Dr. Johnson proclaimed that he was familiar with the standard of care in Kingsport, Tennessee, and one of the reasons for this familiarity was the statements of Dr. Rosser and Dr. Michalik contained in their depositions wherein they described the standard of care.

Both Dr. Rosser and Dr. Michalik stated that the standard of care in Kingsport, Tennessee was that after a pulmonary consult was obtained in a post-operative patient such as Ms. Robinson, *the pulmonary physician took over the pulmonary responsibility for the patient.* This lends no support to the claim of Dr. W. Dudley Johnson that when a consultation is requested that both the cardiac surgeon and the pulmonologist share in the respiratory management of the patient. Dr. Johnson also made the statement in his affidavit that he had read the questions and answers of Dr. Rosser and Dr. Michalik during their depositions as they pertain to the standard of care, but he ignored the standard of care clearly explained by these two physicians that the standard of care required responsibility for pulmonary care to be that of the pulmonologist when consultation is made. Dr. Johnson testified "the standard of care in Milwaukee, Wisconsin, would be identical to the explanation given by Dr. Rosser and Dr. Michalik". Given this statement, then the plaintiff's expert is adopting the standard of care stated by Dr. Rosser and Dr. Michalik and he should not be heard to claim the contrary. Furthermore, Dr. Johnson went on to claim that the standard of care in Kingsport, Tennessee, is the same as a board certified physician in any state. This is based upon a national standard and such evidence may not substitute for evidence that first establishes the requirements of T.C.A. § 29-26-115. See *Robinson v. LeCorps*, 83 S.W.3d 718 (Tenn. 2002).

Also, Dr. Johnson goes on to make the statement that "there is no difference in the standard of care for the treatment of Sandra Robinson by a board certified medical doctor or by someone who is practicing in the fields of cardiac surgery and pulmonology, or intensive care nursing and medicine." This statement again exhibits a total lack of understanding

of the standard of care which he says is the same in both Kingsport, Tennessee and Milwaukee, Wisconsin based upon the statements of Dr. Rosser and Dr. Michalik.

Dr. Johnson's claimed reliance on the statements of Dr. Rosser and Dr. Michalik demonstrate that he, Dr. Johnson, simply ignored the statements of these physicians as to the standard of care because the statements made by these physicians show, without question, that Dr. Johnson's standard of care definition for Kingsport, Tennessee, is completely and wholly in error and absolutely contrary to the testimony of Dr. Rosser and Dr. Michalik that he adopted, advocated and supported as setting forth the same standard of care that exists in Milwaukee. The statements made in the report and affidavit of Dr. Johnson absolutely demonstrate the lack of trustworthiness of such testimony. The proclaimed reliance on the standard of care stated by Dr. Michalik and Dr. Rosser, which is quite clearly contrary to the opinions advanced by Dr. Johnson renders his opinions totally unreliable. This was recognized and declared to be so by the District Court. In its Memorandum Opinion the District Court stated as follows:

> Absent a claim that Dr. Rosser was incompetent and Dr. Michalik knew or should have known that he was incompetent, or absent a claim that Dr. Michalik had actual knowledge that the extubation was contra-indicated, Dr. Michalik reasonably should be allowed to rely on the pulmonologist to perform his job competently. Stated another way, Dr. Michalik should not be charged with the duty of standing over the pulmonologist and second-guessing every decision made by him in the realm of the

> pulmonologist's responsibility. Otherwise, there would be little reason to request the services of a pulmonologist. It is, after all, the area of the pulmonologist's specialty and is not within the expertise of a cardiac surgeon. Dr. Johnson himself acknowledged that he often requests pulmonary consultations in his cases, and only rarely performs an extubation himself.
>
> Dr. Johnson's opinion simply is not reliable to the extent that he maintains that Dr. Michalik should be responsible for the premature extubation - if indeed it was premature performed by Dr. Rosser. Dr. Johnson professed that he relied upon the deposition testimony of Drs. Michalik and Rosser to underpin his knowledge of the standard of care applicable to cardiac surgeons in Kingsport, Tennessee. However, as evidenced by the affidavits of five physicians who actually practice in the Kingsport area, it is clear that, at least in Kingsport, Tennessee, once a pulmonology consult is obtained, the pulmonologist assumes management of the patient's ventilation and extubation. In short, Dr. Johnson's opinion is not considered reliable in the sense contemplated by *Daubert and Kumho Tire.* Moreover, Dr. Johnson could not cite to any treatise or other learned work to support his opinion. Dr. Johnson's opinion is *ipse dixit,* and nothing more.

(*See* Appendix B, page 16(a)).

The Court relied on the holding of *General Electric Company v. Joiner*, 522 U.S. 136 (1997) wherein the Supreme

Court held that the admissibility of expert testimony is discretionary with the trial judge and reviewable under the abuse of discretion standard: *"[O]n a motion for summary judgment, disputed issues of fact are resolved against the moving party . . . . But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard.*" The District Court below specifically acknowledged in a footnote to its Memorandum Opinion that:

> At first blush, it appears that the Court is weighing conflicting evidence - Johnson's opinion versus those of the five Kingsport physicians - which normally the Court may not do while considering a motion for *summary* judgment. [sic] But where the issue is the reliability of expert opinion under *Daubert,* there necessarily is a modicum of "weighing the evidence. " *In General Electric Co. v. Joiner,* 522 U. S. 136 (1997), the Supreme Court flatly held that the admissibility of expert testimony is discretionary with the trial judge and is reviewable under the abuse-of-discretion standard: "On a motion for summary judgment, disputed issues of fact are resolved against the moving party .... But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of-discretion standard. *Id.,* at 143. Dr. Johnson's conclusion is founded solely upon his *ipse dixit.* The difference between his conclusions and those of the five local physicians is stark and diametrically opposed. The basis of Dr. Johnson's opinion is, "it is because I say it is," and that simply cannot be determined to be reliable in the

> face of five local physicians who actually practice medicine in Kingsport, Tennessee, day in and day out.

(*See* Appendix B, page 19(a)).

In holding that the District Court did not abuse its discretion by excluding the testimony of Dr. Johnson regarding the alleged negligence of Cardiac and Thoracic Surgery the Sixth Circuit stated as follows:

> As the district court noted, "Dr. Johnson professed that he relied upon the deposition testimony of Drs. Michalik and Rosser to underpin his knowledge of the standard of care applicable to cardiac surgeons [such as Dr. Michalik] in Kingsport, Tennessee." Nothing in those depositions, however, supports Dr. Johnson's opinion that the cardiac surgeon is responsible for the pulmonologist's decision of when to extubate a patient. At the most, the deposition of Dr. Michalik indicates that the cardiac surgeon often makes the decision to extubate and that frequently such decisions are made collaboratively with a pulmonologist. In this case, however, the uncontroverted evidence establishes that Dr. Michalik called upon Dr. Rosser to "assume that responsibility" and "it was Dr. Rosser who ordered the extubation of the tube." The lack of support for Dr. Johnson's opinion, coupled with the affidavits of five Kingsport, Tennessee physicians who explained that the practice in Kingsport is that "once a pulmonology consult is obtained, the pulmonologist assumes management of the

> patient's ventilation and extubation," convinced the district court that Dr. Johnson's opinion on this issue was unreliable. In light of the lack of support for Dr. Johnson's opinion and the contrary evidence found in the affidavits of the local physicians, we conclude that the district court did not abuse its discretion by excluding this testimony. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 143, L. Ed. 2d 238, 119 S. Ct. 1167 (1999) ("The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.").

(*See* Appendix A, page 13(a)).

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied. The Sixth Circuit correctly held that the District Court did not abuse its discretion in disallowing Dr. Johnson's testimony, that testimony being patently unreliable and simply *ipse dixit* on the part of Dr. Johnson.

Respectfully submitted,

M. LACY WEST
Counsel of Record
STEVEN C. ROSE
JULIA C. WEST
WEST & ROSE
537 E. Center Street
P.O. Box 1404
Kingsport, TN 37662
(423) 246-8176

Counsel for Respondent